



IN THE COURT OF APPEAL OF KENYA
AT NYERI

CRIMINAL APPEAL 250 OF 2004

FESTUS MBUTHIA MWANGI APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal from a conviction and sentence of the High Court of Kenya at Nyeri (Khamoni, J.) dated 9th July, 2004

In

H.C.Cr. Case No. 119 of 2003)

JUDGMENT OF THE COURT

In what he titled “*Amended Memorandum of Appeal*” dated 31st July, 2006, Mr. S.N. Mukunya, learned counsel for the appellant Festus Mbutia Mwangi, complains in ground one thereof that

“The learned Judge erred in law in not appreciating that the evidence adduced by the prosecution witnesses showed that the accused was insane and was incapable of standing trial.”

In the end, even Mr. Kaigai, learned Senior State Counsel who answered on behalf of the Republic, did concede that the appeal must be determined on this ground. The appellant was charged with the offence of murder contrary to **section 203** as read with **section 204** of the Penal Code, and the particulars contained in the information were that on 22nd June, 2003 at Muthathini village in Nyeri District of the Central Province, the appellant murdered Charles Mwangi Mbutia, the deceased hereinafter. The deceased was the appellant’s father and his widow Florence Wangechi Mwangi (P.W 1) stated that the appellant had previously been away from home in Nairobi for some four years before the incident of 22nd June, 2003 and that when the appellant returned home, he was a changed person. In the words of Florence:-

“When he came from Nairobi I had noticed that the behaviour of the Accused was not normal and I had even expressed my concern to my husband. He had torn long trousers and his thighs from the hip to his knees could be seen. He also had torn shoes and he did not look co-operative.”

In cross examination, Florence continued:

“The Accused started burning clothes after he came from Nairobi but on different three days prior to

22nd June, 2003. On 21st June, 2003 the Accused refused to assist me and my husband carry timber. After coming from Nairobi he had given us assistance in some other work.

But when he came I had observed he did not look ok (sic). His clothings, his general demeanour, were not proper. He seemed to have something wrong in his mind. I asked him whether he was taking bhang but he denied taking bhang.

It is clear from these passages that the general tendency of the evidence of Florence was that the behaviour of the appellant since returning from Nairobi was not that of a normal person.

Dr. Monica Kariuki (P.W 2) examined the appellant on 15th July, 2003, about one month after the date of the offence. According to Dr. Kariuki the appellant's mother gave her a history of changed behaviour on the part of the appellant and that the mother and the deceased had intended to take the appellant to hospital with the assistance of the police. Dr. Kariuki then continued as follows:-

"I examined him. He was apprehensive, defensive and disorientated. But was able to follow the procedure."

In cross-examination, Dr. Kariuki stated:-

"He was always defensive, always trying to show he did no harm to the victim. The effect of alcohol dies out when continuous taking is stopped. When someone is dis-inhibited it means he talks of things like sexual matters which he should not have talked about. I recommended that he was fit to stand, to follow proceedings and stand trial."

Once again the evidence of Dr. Kariuki generally showed that the appellant's behaviour was not that of a normal person.

The appellant first appeared before Mr. Justice Khamoni on 22nd October, 2003, some four months from the date of the offence and it is not clear from the record how the learned Judge dealt with the matter. All that is shown in the record for that day is as follows:-

"Court

Mr. Obuo having got the police case file and having supplied copies of statements to defence counsel, hearing on 18th & 19th May, 2004 plea having been taken and accused having pleaded "not guilty."

There is no indication in the record, as is normally the case, that the charge was read and explained to the appellant, that the appellant understood the charge and every element thereof, and that he then pleaded not guilty. This is important in this case because the next time the appellant spoke in his trial was when he gave his sworn evidence and when cross-examined the appellant said:-

"I have no problem with people at home. Nobody there told anything bad had happened to my father because nothing happened to him, up to now nothing has happened."

This evidence was given on 16th June, 2004, nearly one year from the date of the offence and even at that time, the appellant was still contending that his father was still alive. Dealing with this aspect of the matter, the learned Judge stated in his judgment as follows:-

"My observation of the Accused in these proceedings before me convinces me that the parents of the Accused were justified in holding the views they held about the Accused. From what I have recorded in this judgment and from the evidence on record, the Accused is somebody who at one time sends out the signals of a normal person while at other time sends out signals of an abnormal person.

Had the accused been able to hire a private advocate to defend him in this case, perhaps and with all

due respect, that advocate could have assisted this court better than the pauper brief advocate who has defended the Accused in these proceedings. The contents of exhibit 1 from Dr. Kariuki Monica a psychiatrist at the Provincial General Hospital, Nyeri, could have led to further psychiatrist examination initiated by the Accused for the purpose of his defence.”

We agree with the learned Judge that the burden of raising the defence of insanity is on the person raising that defence - see **section 11** of the Penal Code - but surely that cannot mean that even when the court itself sees that there is something wrong with an accused person as was clearly apparent to the learned Judge here, the court cannot itself order a further medical examination of such an accused person to determine whether that person understands the proceedings before the court and/or the state of his mind at the time the crime was committed. The learned Judge then summarizes his views on the sanity or otherwise of the appellant in the following way:-

“.....Saying that his father has not died suggests among other things referred to above, that there is something wrong with the Accused. He is either abnormal or he is otherwise not understanding these proceedings though he may not be insane.”

In either of these two alternatives, there was really no reason for the learned Judge to proceed with the trial after he realized the appellant was either abnormal or not understanding the proceedings. It is the abnormality, we assume, which would make him not understand the proceedings and putting the burden upon the appellant to obtain further medical examination to determine if he understood the nature of the proceedings was, in all the circumstances of the case, clearly unjustified. The evidence by the prosecution witnesses suggested insanity on the part of the appellant and that shifted the burden of proof to the prosecution to show that the appellant understood the proceedings going on before the learned Judge.

We agree with Mr. Mukunya that in the circumstances of this case, the learned Judge was in error in invoking the provisions of **section 167(1) (b)** of the Criminal Procedure Code. We further agree with Mr. Mukunya that the learned Judge should have invoked the provisions of **section 162** of the Criminal Procedure Code. Accordingly we set aside all the orders made by the learned Judge and in their place, order that the case be remitted back to Khamoni, J so that he can comply with all the relevant provisions of **section 162** of the Criminal Procedure Code. Of course if in the end the appellant is found fit to stand trial, then he shall be retried before a Judge other than Khamoni, J. Those shall be our orders in this appeal.

Dated and delivered at Nyeri this 4th day of August, 2006.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

W.S. DEVERELL

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.